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Supreme Court of the United States

October Term, 1979

No. 79-1169

SANFORD J. BERGER,
Appellant,

vs.

BERTINE M. BERGER,
Appellee.

ON APPEAL FROM THE ~~SUPREME COURT OF~~ OHIO

JURISDICTIONAL STATEMENT

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vs.

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

This appeal is taken from the final order of the Supreme Court of Ohio entered on November 2, 1979, overruling Appellant's Motion for Rehearing. Appellant submits this statement in support of the jurisdiction of the Supreme Court of the United States to hear this appeal and to show that substantial federal questions are presented in this appeal.

OPINIONS BELOW

No Opinion was rendered herein by the Supreme Court of Ohio. The Journal Entry and Opinion of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio is unreported. The Judgment Entry and subsequent Order and Judgment Nunc Pro Tunc Entry of the

Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio, are unreported. A copy of the Court of Appeals Journal Entry and Opinion is attached as Appendix C, and copies of the Judgment Entry and Order and Judgment Nunc Pro Tunc Entry of the Court of Common Pleas is attached in Appendix D.

JURISDICTION

This appeal is taken by Appellant in an effort to have certain Ohio statutes, their application, and court practices in divorce and alimony matters declared unconstitutional because of their being gender-based classified and gender-favored in their application. Appellant is appealing to this Court from an order of the Supreme Court of Ohio, entered on November 2, 1979, overruling Appellant's Motion for Rehearing (App. B, p. A3). By this order, the Supreme Court of Ohio, by its inaction, made final the Journal Entry and Opinion of the Court of Appeals (App. C, p. 10A) which upheld the discriminatory statutes and practices of trial and intermediate appellate courts in the face of Appellant's constitutional challenges.

On November 21, 1979, the Appellant filed a "Notice of Appeal to the Supreme Court of the United States" in the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio (App. A, p. A1) and mailed the same to Counsel for the Appellee.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(2). Cases which sustain this jurisdiction include: *Orr v. Orr,* 440 U.S. ....., 99 S. Ct. 1102 (1979); *Childs v. Childs,* 440 U.S. ....., 99 S. Ct. 1488 (1979); and *Califano v. Westcott,* 47 U.S.L.W. 4817 (1979).

In addition, Appellant will document special and important reasons why this Court should assume jurisdiction under Part V, 1(a) and (b) of this Court's Rules calling for an exercise of this Court's power of supervision over the Ohio trial and appellate courts abandoning of constitutional principles in divorce and alimony matters, and the silent acquiescence therein by the Supreme Court of Ohio.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V, providing in pertinent part:

> "* * * nor be deprived of life, liberty or property without due process of law, * * *"

The United States Constitution, Amendment XIII, §1, providing:

> "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The United States Constitution, Amendment XIV, §1, providing in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code §3103.03. Duty of husband to support family.

"The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able.

Notwithstanding section 3109.01 of the Revised Code, (explanation: refers to age of majority at 18) the parental duty of support to children shall continue so long as the child continuously attends on a full-time basis any recognized and accredited high school, even when such child has attained the age of majority. Such duty of support shall continue during seasonal vacation periods.

If he neglects to support his wife, any other person, in good faith, may supply her with necessaries for her support, and recover the reasonable value thereof from the husband unless she abandons him without cause."

Ohio Revised Code §3105.18 Alimony.

"(A) In a divorce, dissolution of marriage, or alimony proceedings, the court of common pleas may allow alimony as it deems reasonable to either party.

The alimony may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, as the court deems equitable.

(B) In determining whether alimony is necessary, and in determining the nature, amount, and manner of payment of alimony, the court shall consider all relevant factors including:

(1) The relative earning abilities of the parties;

(2) The ages, and the physical and emotional conditions of the parties;

(3) The retirement benefits of the parties;

(4) The expectancies and inheritances of the parties;

(5) The duration of the marriage;

(6) The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;

(7) The standard of living of the parties established during the marriage;

(8) The relative extent of education of the parties;

(9) The relative assets and liabilities of the parties;

(10) The property brought to the marriage by either party;

(11) The contribution of a spouse as homemaker.

(C) In an action brought solely for an order of alimony under section 3105.17 of the Revised Code, any continuing order for periodic payments of money entered pursuant to this section is subject to further order of the court upon changed circumstances of either party.

QUESTIONS PRESENTED

The questions presented here are essentially the same questions presented to the Supreme Court of Ohio (App. B, pp. A6-A7).

Summarized, they are:

I. Does §3103.03, because it is gender-classified and imposes no duty of support on wives, deny equal protection to husbands and permit the taking of their property without due process of law in violation of the Fifth and Fourteenth Amendment to the United States Constitution?

II. Does §3105.18, per se and as administered, deny equal protection to husbands and permit the taking of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution; as §3105.18 is vague and indefinite, sexist-oriented, quasi-penal, and has as its foundation §3103.03?

III. Does the taking of all of a husband's property, leaving him insolvent, and giving it to the wife, who has maintained a live-in, de facto marital relationship with another man for 22 months prior to the award, constitute "peonage" in violation of the Thirteenth Amendment, 42 U.S. Code §1994, the due process clause of the Fifth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

IV. Does an intermediate Ohio appellate court that ignores and avoids the doctrine of *stare decisis* in matters involving its own precedents, statutory procedure, and property rights, thereby treating each appellant differently, deny to an appellate litigant the equal protection of the law

and permit the taking of his property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE INCLUDING THE RAISING OF AND RULING UPON THE FEDERAL QUESTIONS

This proceeding began in the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio, on December 3, 1975, when Bertine M. Berger (wife) filed her Complaint for divorce against Sanford J. Berger (husband). At that time, the parties had been married more than 25 years. The husband, thereafter, filed his Cross-claim for divorce joining the de facto husband of his wife, Raymond Gardini, to account for certain missing marital property. Mr. Gardini countered with a claim against the husband for care and attention given to the wife, and the husband countered with a suit for alienation of affections against the de facto husband (App. D, pp. A32-A34). Trial was had in the latter part of 1977, and on September 24, 1977, the trial court issued its Judgment Entry (App. D, pp. A22-A31). Said Judgment Entry was void for failure of the court to comply with Local Rules of Court and the Ohio Rules of Civil Procedure. Each party then submitted corrective Order and Judgment Nunc Pro Tunc Entries: the court accepting the wife's Entry (App. D., pp. A31-A34) on October 26, 1977, and rejecting the husband's Entry (portion in App. D, p. A37) wherein the husband raised the federal questions (Also see, App. D, p. A36). The husband's timely Motion for the Court to State in Writing its Findings of Fact separately from its Conclusions of Law (written, not oral) was overruled by the court, as was the husband's timely Motion for a New Trial, wherein the

husband again raised the federal questions (App. D, p. A39).

The corroborated facts before the trial court were that the wife had abandoned the husband without cause, prior to filing for divorce, to commence a live-in de facto marital relationship with another man which continued uninterruptedly for 22 months (App. D, pp. A37-A38), the trial court noting in the record that the relationship between the wife and her de facto mate had commenced 28 months before the Judgment Entry; that the husband had expended more than $243,000 on the marriage for the twelve year period preceding the filing of divorce by the wife, while the wife had expended less than $20,000 on herself and the home during the same period; that the wife in 1974, 1975 and 1976 had more income from all sources than the husband, but that the husband paid all federal, state and city taxes on the wife's income; and that the combined appreciated value of all of the property of both husband and wife, as estimated by the husband, was approximately $250,000 at time of trial, with the husband having $73,000 in liabilities. Uncontroverted testimony was offered by a bank official that the wife and her sister were the beneficiaries of a $400,000 trust of the widowed mother, and that the wife had savings accounts totalling approximately $36,000 (App. D, p. A38).

The Judgment Entry of the trial court gave all of the property to the wife, directly or by omission, leaving the husband insolvent.

The husband then appealed timely to the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio, raising the federal questions therein (App. C, p. A13). In its Opinion (App. C, pp. A10-A21), the Court of Appeals held that the constitutional rights of the husband had not been violated (App. C, pp. A19-A20), and upheld the actions of the trial court. However, in its Opinion, the Court of Appeals did not note, modify, distinguish or reverse its own cited precedents, which would have compelled a reversal. The husband's Motions for Reconsideration and to Certify to the Supreme Court of Ohio on Grounds of Conflict were both overruled (App. C, pp. A9-A10). Both motions were unopposed by wife's counsel.

The husband then appealed timely to the Supreme Court of Ohio, raising the federal questions (App. B, pp. A6-A7). Said appeal was dismissed sua sponte for the reason that no substantial constitutional questions existed therein (App. B, p. A4). The husband's timely Motion for Rehearing was denied on November 2, 1979 (App. B, p. A3).

With respect to the raising of federal questions, the Court of Appeals for Cuyahoga County, Ohio, has taken the position, in civil and criminal matters, that when the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, as it pertains to a fair trial, is involved,

> "* * * the Court of Appeals may consider such error even though it was not brought to the attention of the trial court by objection or otherwise and was not assigned as an error on appeal."

State v. Eiding, 57 Ohio App. 2d 111, 385 N.E.2d 1332 (1978).

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

Recently, a very wise judge in Red China obtained a copy of the U. S. Constitution. Impressed with the document, he summoned his most brilliant clerk and dispatched him to America to observe American justice in action. However, the clerk was admonished not to disclose his

mission, so that there would be no contrived action for his benefit. Co-incidentally, the clerk came to Ohio, sought out a courthouse, and after wandering the corridors, found a court in session. Quietly seating himself, he observed the proceedings therein for most of the day, and then returned to his homeland to make his report. The following conversation ensued:

Judge: Tell me, my son, what did you observe?

Clerk: Regretfully, I cannot say with certainty what I saw. It appeared to be an action for the rescission of a contract for marriage between a man and a woman. However, it was necessary that the man be charged with the commission of a crime before the contract could be rescinded, so it might have been a criminal case.

Judge: And what was the crime the man was charged with?

Clerk: Gross Neglect of Duty, sir.

Judge: What are the elements of this crime?

Clerk: They are not written, sir.

Judge: Then how does the defendant know if he is committing this crime?

Clerk: He never does, sir. The judge listens to the woman's story and then the man's story, and then decides if the man has committed the crime.

Judge: You say the judge "decides"—don't you mean the jury decides?

Clerk: There is no jury, sir.

Judge: This is very confusing. The U.S. Constitution guarantees a right to trial by jury, and also says that no state shall pass any law impairing the obligation of contracts. Are you sure that the man must be proven guilty of a crime?

Clerk: Yes, because the judge said the man was GUILTY of Gross Neglect of Duty: he did not say that he had breached the marriage contract. And besides, there are severe penalties imposed upon the man after he has been found guilty.

Judge: What are these penalties?

Clerk: They are not written, sir.

Judge: Then how does the judge know the limits of the penalties he may impose?

Clerk: It is written that the judge has "a wide latitude and a broad discretion" in imposing any penalty he wishes.

Judge: Well, in the case you heard—what penalty was imposed?

Clerk: The judge took away all his wordly possessions, his children, and ordered him to pay periodic fines to his wife so long as she shall live or until she legally remarries. The man was then ordered to be banished for life, but his children can visit him for short periods during his banishment. I felt that showed compassion on the part of the judge.

Judge: You must have left something out; give me more details of what transpired.

Clerk: Well, the woman secretly went to the man's office when he was not there, took all his diaries, appointment books, account books and other private papers and gave them to her lawyer, and—

Judge: Stop there. Who gave her the warrant for such a search and seizure?

Clerk: A warrant is not required, sir.

Judge: But the court could not allow these illegally seized papers into evidence—I have read that.

Clerk: But the court did, sir.

Judge: Let's go back a minute. I didn't understand the part about why the man has to pay a fine to his wife for so long as she lives or until she legally remarries.

Clerk: It is not really called a fine, sir; it is an American word called "Alimony," and it is given to American women because the American law says the man must support his wife during the contract of marriage and after his banishment.

Judge: But why can't the woman work during the marriage and afterwards, and support herself?

Clerk: She can work, your honor, but the American law says she does not have to use the money she earns to support herself. There is something else I almost forgot, sir, the woman had left the man to go live with another man in a non-legal marital relationship.

Judge: Well, surely the judge must have punished the woman and the new man for such conduct. As I remember, it was a crime called "Adultery."

Clerk: No, your honor, it is the new accepted American lifestyle: millions of Americans are now doing it, and as the government doesn't regulate it, it cannot be a crime, and no one can be punished.

Judge: Then if the new man is living with the woman and enjoying all of her services, why didn't the court order the new man to support the woman instead of the first man who no longer had the benefit of her services?

Clerk: That is not how Alimony works, sir. It seems that the first man must give up all of his property so that the woman can live comfortably with the new man in accordance with the standard of living

she was accustomed to when she was married to the first man. It is nice for the new man, because the first man indirectly supports him, also.

Judge: You neglected to tell me what acts on the part of the first man constituted the crime of Gross Neglect of Duty.

Clerk: Well, as best as I could understand it, he only made a modest living and did not give her as much money as she could spend. Further, he had contact with another woman who worked for him.

Judge: Physical contact?

Clerk: No, strictly contact in their business relationship.

Judge: Now I am totally bewildered. But tell me, did anything else of interest happen while you were there?

Clerk: Yes, after the trial I spoke of was concluded, two soldiers brought in a Mr. Hamilton (*infra*) in handcuffs.

Judge: What was his offense?

Clerk: He had a bad habit, sir.

Judge: What was that?

Clerk: He liked to eat at least one meal a day, sir.

Judge: That doesn't seem like a crime.

Clerk: It must have been, sir, because the court had previously ordered him to pay $3,900 a year to Mrs. Hamilton, and he only made $3,176 a year; so if he wanted to eat, he couldn't pay Mrs. Hamilton the whole amount.

Judge: Had he been sentenced previously when his contract of marriage was rescinded?

Clerk: Yes, his wife got 73% of the property and he got 27%.

Judge: What happened to him then?

Clerk: The judge ordered the soldiers to put him in jail.

Judge: That cannot be. The U. S. Constitution says you cannot be imprisoned for debt, and cannot be punished twice for the same offense.

Clerk: Mr. Hamilton didn't seem to mind, sir. As they dragged him away, I heard him say, "At least I'll be able to eat three meals a day now."

Judge: Anything else?

Clerk: Yes, I sat in on a very brief proceeding in another courtroom where a man had been charged with murdering his wife.

Judge: Why do you say "brief"?

Clerk: Because in that case when the man found out his wife was living with another man, he went berserk and killed her. But when the soldiers came to arrest him, they forgot to read him some kind of rights, and the judge had to let him go free.

Judge: Does a man in a divorce action have to be read his rights, also?

Clerk: I don't believe he has any rights, sir.

Judge: Strange country that America.

This Court has never ruled upon the validity of a state statute placing the sole burden for family support upon the husband, although this Court has heard and resolved appeals of cases involving constitutional questions relating to a state's intrusion into the family setting when that intrusion results in the allocation of the paternal burdens along sexually discriminatory lines. *Stanton v.*

Stanton, 421 U.S. 7, 95 S. Ct. 1373 (1975) and *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251 (1971).

Recently, in *Orr* and *Childs, supra,* this Court examined two offshoots of the Family Law Tree for the first time, and pruned the statutes involved therein as being violative of the United States Constitution. Herein, Appellant asks this Court to scrutinize the taproots (§3103.03) of that very same Tree to determine whether or not it has been infected by gender-classified sexual discrimination; and if so, whether that infection has spread to Ohio's Alimony statute offshoot (§3105.18), making it unconstitutionally contaminated per se. In addition, Appellant asks this Court to inspect §3105.18 and decide whether it can constitutionally survive because of the manner in which it has been arbitrarily administered by the trial and appellate courts of Ohio.

Appellant understands the importance, and would have preferred to have presented only one thread of the tapestry of Ohio injustice in divorce matters to this Court; but it is only by weaving all of the threads together that the picture of statutory and judicial discrimination appears—and to do this, he must partially rely on the quasi-secret Unreported Opinions of Courts of Appeal in Ohio.

Question I

This Court examined gender-classified relationships between husbands and wives in *Orr* and *Childs, supra;* and then gender-classified relationships between fathers and mothers in *Califano v. Westcott, supra,* and *Caban v. Mohammed,* 440 U.S. ....., 99 S. Ct. 1760 (1979). In all instances, the statutes involved would not stand constitutional scrutiny under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment. Herein, the challenged statute,

§3103.03, placing the sole duty of support upon the husband for the wife, the marriage, and the children, falls squarely within the prohibitions enunciated in the foregoing cases. The attempted saving provision that, "If he is unable to do so, the wife must assist him so far as she is able." places no duty upon the wife, implies that the wife is in a secondary and subordinate position, and casts doubt upon the fact that women are capable of rendering such assistance. In an article by Charlotte L. Levy entitled, *Vestiges of Sexism in Ohio and Kentucky Property Law; A case of De Facto Discrimination,* 1 No.Ky.St.L.F. 193 (1973), the author states:

> "In relation to the male spouse, the law implies that he is somehow remiss in his duties unless he is capable of providing support. The law makes an inherent value judgment that every married male must be a superman and that it is less than masculine for a male to depend upon his wife for support."

In essence, Ohio law demands that the wife be coddled, and that the husband be penalized if he does not. Accordingly, §3103.03 gives the wife statutory immunity to accumulate property with no responsibility or obligation on her part to be a financial partner in the marriage with respect to contributing to the standard of living of the parties, the support of herself, the marriage, or the children. In *Taylor v. Louisiana,* 419 U.S. 522, 535 n.17 (1975), this Court reviewed figures on women's employment across the country, and after noting that 51.2% of mothers whose husbands were present were in the work force, stated that these figures put to rest the notion that women serve a particular home related function.

The discriminatory end result, therefore, is that in a progressively increasing, inflationary economic trend—the husband is being drained of assets and liquidating

property to try and support the marriage; while the wife is permitted to accumulate and sequester assets with immunity from expense. The law of Ohio demands that husbands pay *all* of their wives' expenses; but with women now being in a position to have substantial income and assets of their own, §3103.03 makes it mandatory that the husband not only support his wife, but that he support his wife's money, by paying the wife's taxes on her income if they file a joint tax return; compounding the unfairness. The progressive pattern is that the husband is steadily going into debt to support the marriage, while the wife has statutory license to hoard her growing assets. Equality in marriage should not mean that the husband pull the wagon alone while the wife goes for a free ride thereon; but, rather, that the two of them share the responsibility and struggle of pulling the wagon together.

Question II

§3105.18 is sufficiently tainted by the sexual discrimination of §3103.03 to make it sexist-favored and unconstitutional. An examination of some of the factors of §3105.18 reveals the one-sidedness:

(1) *The relative earning abilities of the parties*; The wife's earning ability need not be tested and is an unknown factor, as the husband has the statutory duty to coddle the wife. Therefore, the husband must have earning ability, and the wife need not.

(3) *The retirement benefits of the parties*; Since only the husband has the statutory duty to work, he is usually the only one with retirement benefits—but he has no assurance he is going to live long enough to enjoy them; yet they go on the marital balance sheet.

(6) *The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home*; This one is subliminally loaded for the wife. Since only the husband is compelled from the inception of the marriage to support the wife and children, the presumption weighs heavy that the role playing will be perpetuated: with the wife getting the home of the minors, their custody, their continuing support, and her own support from the husband and father. That the *status quo* be maintained for the welfare of the children, except that the father is no longer part of the *status quo*. Daddy's money can stay, but in order to prevent home disruption, daddy has to go; and mommy need not account to daddy on how she spends the child support money. The cute twist is the word "he" above, as daddy has always been employed outside the house.

(7) *The standard of living of the parties established during the marriage*; Established solely by the husband because of his duty to support wife during the marriage; but standard maintained for wife, by court, after divorce, by disproportionate property division or a reasonable property division plus sustenance alimony to perpetuate the role playing myth that she is an economically helpless cripple.

(9) *The relative assets and liabilities of the parties*; The husband does not have the same equal opportunity to accumulate assets as the wife does in an inflationary economy—since there is a statutory obligation upon the husband to incur liabilities of his own while being compelled, by law, to liquidate the liabilities of the wife. The husband pays for consumable assets, while the wife does not.

(10) *The property brought to the marriage by either party*; Hypothetically, if both the husband and wife bring $25,000 each to the marriage, the husband must use his to set up the marriage by purchasing consumable assets (engagement and wedding rings, apartment furniture and furnishings, autos, etc.) and pay the expenses of the marriage (rent, utilities, food, clothing, medical and dental, etc.); while the wife need not contribute any part of her $25,000 to the marriage. The husband's $25,000 is soon gone; but in the eyes of the law, they have each brought an equal amount to the marriage and the wife's $25,000, still untouched and much appreciated, is excluded from the assets of the marriage upon divorce.

(11) *The contribution of a spouse as homemaker.* This is the real trump card held by the wife and makes everything preceding almost inconsequential. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, Unabridged, Second Edition, 1956, defines a "homemaker" as: "n. a woman who manages a home; housewife." Accordingly, this gender-classified favoritism permits the trial court to apply the principles of *quantum meruit* in determining how much "back pay" and "pension" the wife should get for her past services—and if the wife has future economic needs, how much "alimony" will be allowed for her future support. Jefferson Standard Life Insurance Co., Greensboro, N.C., estimated on September 21, 1978, that a housewife's value measured in cash was $18,282.68 annually. Take that back 25 years and allowing for inflation, that doesn't leave much for a divorced husband. No such "special solicitude" is given to the husband, who during the marriage acted as chauffeur, plumber, butler, electrician, carpenter, painter, paperhanger, gardener, auto mechanic, and all-around general handyman and houseboy. The end result is that we have codified *quantum meruit* favoritism being given the wife, to the exclusion of the husband.

Where a statute includes an extensive list of items, it should usually be construed to exclude by implication items not on the list: the doctrine of *expressio unius est exclusio alterius.* SUTHERLAND STATUTORY CONSTRUCTION, §47.23 at 123. Therefore, no consideration is given to the hundreds of thousands of dollars the husband poured into the marriage to make it function.

§3105.18 is vague and indefinite in that there is no statutory jurisdictional authorization for a division of property, and in application, the statute can be quasi-penal. In Ohio, any award made to either party is termed "alimony," but in many instances there is no certainty whether the amount awarded constituted a property division or an award for sustenance and support. The last attempt by the Supreme Court of Ohio to construe §3105.18 was in *Wolfe v. Wolfe,* 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976). Therein, the court gave relief to John Walton Wolfe, a newspaper publisher in the state capital, by decreeing in a *non per curiam* opinion that a trial court is authorized to modify an alimony award for sustenance if the ex-wife has established a de facto marriage with another man subsequent to the divorce. The *obiter dictum* opinion attempted to give clarity to §3105.18, but only added to the confusion; as trial and appellate courts continue to wander aimlessly all over the judicial horizon in attempting to construe the statute which defies judicial interpretation, as will be shown, *infra.* In the *Wolfe* decision, p. 411, it is said:

> "Courts have long recognized that the monetary provision made for wives at divorce casts a mixed hue of 'alimony' and a division of property; . . ."
>
> "* * * courts and parties have frequently failed to delineate whether the award was for sustenance or

> constituted a property division for the reason such delineation was not considered important." p. 421.

Delineation was important to the husband in *Dungan v. Dungan* (3rd Ohio App. Dist. 7/79), No. 4-79-4, Unreported, who had been ordered in 1971 to pay $40.00 weekly alimony to his wife for the rest of her life or until she remarried. The wife had now established a de facto marriage with another man and Mr. Dungan didn't want to support the de facto husband. The Court of Appeals gave him no relief, saying:

> "In the present case the payments were designated simply as 'alimony' which includes both property division and support, . . . Here we cannot tell from the original decree whether this award was or was not part of the property division."

Mr. Degen, in *Degen v. Degen* (10th Ohio App. Dist. 4/79), No. 78AP-679, Unreported, was ordered to pay $600.00 per month for life or until remarriage of his ex-wife as permanent alimony in 1974. In 1977, his ex-wife having established a de facto marriage, Mr. Degen sought relief. In the *obiter dictum* opinion in *Wolfe, supra,* the court had made its decision prospective only, and Mr. Degen argued that only the syllabus is the law in a *non per curiam* opinion, and that he was denied the equal protection of the law as compared to Mr. Wolfe. Mr. Degen lost, of course, even though it was clear that he was paying sustenance alimony.

Note in the Judgment Entry in Appellant's case (App. D, p. A28) that the award of all interest in the marital home to the appellee is only defined as "alimony;" there being no determination as to whether it was a property division or sustenance alimony, and no determination as to whether appellee was in *need* of sustenance alimony.

The maxims of equity are violated when a court exercises equity jurisdiction (the only jurisdiction Ohio trial courts have to award alimony) without the mandatory condition precedent being adjudicated that there is a need for equity jurisdiction. McCLINTOCK ON EQUITY, §§24-32, and therefore the "alimony" (?) is neither fairly nor substantially related to the purpose of the statute by which it is authorized.

The critical need for identification of alimony is set forth in FATHERS, HUSBANDS AND LOVERS, SECTION OF FAMILY LAW, AMERICAN BAR ASSOCIATION, in an article entitled, *Alimony and Assignment of Property* at page 69:

> "Finally, it is important that the courts do not blur the distinction between alimony and property division. * * * Since alimony and property division spring from different considerations, the courts must recognize the distinction if a uniform application of the law is to be achieved. Furthermore, because of the difference in tax consequences, the distinction between alimony and property division should be clarified in both separation agreements and divorce decrees."
>
> (Footnote) "Alimony is includible in the wife's income and may be deducted by the husband if the payments qualify as periodic. Int. Rev. Code §71(a)(1), 215(a)"

Whatever the "alimony" was in Appellant's case, Appellant has been further penalized by the tax consequences of the divorce decree: the trial court knowing that the wife had a de facto marriage, and that an award of periodic alimony would have been, or should have been, nullified by the rule in *Wolfe, supra.*

Rule 15C of this Court states, "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." A very relevant subsidiary question is the constitutionality of Internal Revenue Code §§71(a)(1) and 215(a) per se and as administered (App. E, p. A40), permitting discriminatory treatment to persons similarly situated by arbitrarily giving tax advantages to a person paying alimony in periodic payments as distinguished from a lump-sum alimony award—the state trial judge, not the federal government or the taxpayer, having the autocratic option to determine by whim or caprice whether alimony awards will be tax-free or tax-burdened under federal law. The inequality is easily illustrated. If appellant had been awarded his $50,000 interest in the marital home, but ordered to pay $50,000 in alimony to appellee over a ten year plus period at $5,000 annually; then appellant could have invested his $50,000 at 10% and received $5,000 income annually, which he would have paid to appellee and expensed off, meanwhile retaining his $50,000 equity. Even the language of the subject Code section is sexist-oriented, and only saved by the Definition contained in Int. Rev. Code §7701(17) (App. E, p. A40). The subject Internal Revenue Code sections constitute a unique delegation of federal authority, without guidelines, to a state judge to capriciously decide whether he will impose a penalty (for no crime committed) and make a tax-free gift; thereby permitting the taking of property, not only without due process of law but with federal license. Appellant does not know of any other instance wherein a state court is permitted to administer federal law. In accordance with Rule 33, par. 2(b) of the Court, Appellant believes that 28 U.S.C. §2403 may be applicable and has served the Solicitor General.

The awarding of all of the $250,000 in marital property to the appellee, leaving appellant $73,000 in debt, was

tantamount to the imposition of a fine, making §3105.18 quasi-penal. In *Campbell v. Campbell,* 17 Ohio App. 2d 87, 244 N.E.2d 525 (1968), the court said:

> "* * * there is absolutely no evidence to support the court's allowance of $5,000 alimony payable for over six years at $15.00 per week. The husband is already saddled with $24,000 worth of debts and no job; he has no assets, nor was there any evidence of earning capacity with which to pay. *This was nothing more than a fine,* and to levy it was an abuse of discretion for which this court must reverse." (Emphasis added)

In *Hamilton v. Hamilton* (6th Ohio App. Dist. 2/79), No. DR77-0906, Unreported, the court spoke of child support payments as being "* * * part of the permanent alimony award * * *." Therein, the wife got $25,300 and the husband got $9,600. After noting that the husband made only **$3,176** *annually,* a visiting appellate judge sitting on the three judge court, and with obvious restraint, dissented from the majority approval, saying:

> "The order of the court requires the defendant to pay a total sum of alimony of $50.00 per week and $25.00 per week child support, or **$3,900.00** per year. Such an award is grossly inequitable and shocks the conscience of this member of the court of appeals. Consequently, I respectfully dissent."

Although not stated, the inference is unavoidable that §3105.18 can be used by a trial court in violation of the Eighth Amendment of the United States Constitution. Further evidence of the quasi-penal character and discriminatory aftermath of §3105.18 is evidenced by the *Records of Domestic Relations Court and Sheriff's Office,* Cuyahoga County, Ohio: 36 warrants were issued in September, 1979; 39 in October, 1979, and 21 in November, 1979.

In 1978, 281 warrants were issued, and 317 in 1977. Less than 5% thereof were for the arrest of women.

Nowhere in §3105.18 is there any statutory authority for a trial court to pick and choose what is or is not a "marital asset," or what is included or excluded from the marital balance sheet for purposes of a property division—yet the trial and appellate courts of Ohio are saying that §3105.18 gives them freedom of choice to arbitrarily decide what marital property should be included or excluded from the marital balance sheet *before* the division of marital property is made between the parties. For example, the trial court's Judgment Entry (App. D, pp. A22-A31) didn't even mention $36,000 in savings accounts of the wife (App. D, p. A38), and the Court of Appeals specifically excluded from the marital balance sheet the mysterious figure of $141,986 (App. C, p. A20). The following summaries of always unreported cases are a sampling of how Ohio trial and appellate courts are administering §3105.18 to obtain statutorily-unauthorized results:

(1) *Brooksieker v. Brooksieker* (8th Ohio App. Dis. 4/79), No. 38620, Unreported. Pension rights of the husband are *not* marital property, are *excluded* from the marital balance sheet, and *not* to be considered in a division of property.

(2) *Natoli v. Natoli* (5th Ohio App. Dist. 9/78), No. 1144, Unreported. Pension rights of the husband *are* marital property, are *included* in the marital balance sheet, and *are* to be considered in a division of property.

(3) *Lytle v. Lytle* (5th Ohio App. Dist. 6/78), No. 4822, Unreported. Property brought to a marriage is *not* marital property, is *excluded* from the marital balance sheet, and *not* to be considered in a division of property.

(4) *Roseborough v. Roseborough* (5th Ohio App. Dist. 9/78), No. CA-670, Unreported. Property brought to a marriage *is* marital property, and is *included* in division of property.

(5) *Gingerich v. Gingerich* (5th Ohio App. Dist. 6/78), No. CA-4750, Unreported. Property brought to a marriage is *not* marital property, and is *excluded* from division of property.

(6) *Udeck v. Udeck* (5th Ohio App. Dist. 11/78), No. CA-4861, Unreported. Gifts to husband by his mother during marriage *included*. Profit-sharing plan of husband *included*.

(7) *Diemer v. Diemer* (8th Ohio App. Dist. 7/78), No. 37586, Unreported. "Expectancies" of husband, though not vested, *are* marital property *includable* on marital balance sheet, and *are* to be considered in division of property.

(8) *McDade v. McDade* (1st Ohio App. Dist. 6/78), No. 204, Unreported. An inheritance received by the wife during the marriage was *not* considered as part of the marital property, and *excluded* from marital balance sheet and division of property.

A multitude of other conflicting unreported cases exist, but the sampling above is typical.

Because §3105.18 is sexist-oriented, quasi-penal, involves property rights and basic constitutional freedoms, is vague and indefinite defying judicial interpretation, it should be strictly construed. Statutes granting special privileges to a special group who are in no particular need should be strictly construed against such beneficiaries. *Charles River Bridge v. Warren Bridge,* 11 Pet. (36 U.S.) 420, 9 L. Ed. 773 (1837). Statutes which impinge on fundamental freedoms should be strictly construed. *Dombrowski v. Pfister,* 380 U.S. 479, 85 S. Ct. 1116 (1965). Legislation interfering with property rights should be strictly construed. *MacMillan v. Railroad Comm.,* 51 F.2d 400 (D.C. Tex.) (1931). *State v. Kruezweizer,* 120 Ohio St. 552, 166 N.E. 228 (1928). Statutes imposing criminal or quasi-criminal penalties should be strictly construed. *U. S. v. Bramblett,* 348 U.S. 503, 75 S. Ct. 504 (1955); *Bell v. United States,* 349 U.S. 81, 75 S. Ct. 620 (1955).

Question III

Giving all of the property of a 27 year marriage to the wife, who for 22 months prior thereto lived with another man in a "de facto" marital relationship, is tantamount to "peonage" as slavery is the forced working for someone else. The husband herein having been forced to work for the wife by virtue of §3103.03, and having the fruits of his 27 years of labor not being given to the wife literally; but figuratively, to the wife and her de facto husband, and their de facto marriage. In *Levy v. Louisiana,* 391 U.S. 68, 88 S. Ct. 1509 (1968) and *Glona v. American Guarantee Co.,* 391 U.S. 73, 88 S. Ct. 1515 (1968); *Weber v. Aetna Casualty Co.,* 406 U.S. 164, 92 S. Ct. 1400 (1972); *Gomez v. Perez,* 409 U.S. 535, 93 S. Ct. 872 (1973), and *Caban v. Mohammed, supra,* this Court collectively said that courts should look to the facts of familial relationships for finding the rights in the cases, and not to the legal status of the relationships, such as illegitimacy or the "lack" of a legal marriage—suggesting that men and women, even though not legally married, had a "de facto" marital relationship that the state or government was required to recognize. De facto translates loosely to "by fact" or even more loosely to "by actions or circumstances." Therefore, what a "de facto marriage" means is that although a wife and her boy-

friend haven't been pronounced man and wife, or have a common-law marriage, they are acting as if they are married by sharing bed and board.

In *Wolfe, supra,* the Supreme Court of Ohio recognized de facto marriages in their opinion, which opinion this Court can examine. *Zacchini v. Scripps Howard,* 433 U.S. 562 (1977). At p. 423, the *Wolfe* opinion stated

> "Now the court has previously ruled that it would be against public policy for a court to enforce an alimony order where the wife, who was receiving the alimony, lived with another person. This isn't based on the fact she has a common law marriage, but on the fact that she, in effect, is holding herself out to others that she is married, that *she is, in fact, attempting to enjoy all the benefits of a marriage by cohabiting with another man and yet not entering into an actual marriage in* order to avoid the loss of alimony." (Court emphasis.)

Surely, if the Supreme Court of Ohio reasons that it is against public policy to continue alimony payments to an *ex-wife* cohabiting with another man *after* her divorce, then it must surely follow that a *wife* cohabiting with another man *during* the 22 month pendency of her divorce is not entitled to all of the marital property. It is the approval of "Quasi-polygamy by court order." *Hunt v. Hunt,* 169 Ohio St. 276, 159 N.E.2d 430 (1959), *Fahrer v. Fahrer,* 36 Ohio App. 2d 208, 304 N.E.2d 411 (1973).

As to the growing popularity of de facto marriages, the BUREAU OF THE CENSUS, *Marital Status and Living Arrangements,* March, 1978, Series P-20, No. 338, issued May, 1979, had this to say:

> "One type of living arrangement which seems to reflect recent **marital trends** is the increase in the

> number of households which contain two unrelated adults of opposite sexes. In 1978, there were an estimated 1.1 million 'unmarried-couple' households, a 117-percent increase since 1970 when there were an estimated 523,000 households of this type (table D)." At p. 3. (Emphasis added.)

Numerous state courts are now being confronted with the problems, responsibilities, obligations and consequences of such relationships; i.e., *Marvin v. Marvin,* 18 Cal. 3d 660, 557 P.2d 106 (1976), but the most honest and direct opinion has come out of the state of Idaho. Their Supreme Court said that with cohabitation there is a resultant presumption of a de facto marriage:

> "The presumption of marriage from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law . . . The law presumes morality, not immorality; marriage, not concubinage; legitimacy, not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

Warner v. Warner, 76 Idaho 399, 283 P.2d 931 (1955).

The taking of the property of a husband to figuratively give to another man, who is bedding-down with the husband's wife, so that the other man and the wife can live in luxury is a pure case of involuntary servitude inflicted upon the husband by judicial action; as the husband has unwillingly worked for the de facto husband's benefit, comfort and well-being. In the case of *Plessy v. Ferguson,* 163 U.S. 537, 542, 16 S. Ct. 1138, 1140 (1896), this Court defined slavery:

> "Slavery implies involuntary servitude—a state of bondage: the ownership of mankind as a chattel,

or at least *the control of the labor and services of one man for the benefit of another,* and *the absence of a legal right to the disposal of his own person, property and services.*" (Emphasis added.)

So, too, in *Bailey v. Alabama,* 219 U.S. 219, 240-241, 31 S. Ct. 146, 151 (1911):

> "While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag. The words involuntary servitude have a 'larger meaning than slavery.' . . . The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by *prohibiting that control by which the personal services of one man is disposed of or coerced for another's benefit* which is the essence of involuntary servitude." (Emphasis added.)

Federal civil rights law carries more weight than state laws. U.S. Constitution, art. VI; *Hamm v. City of Rock Hill,* 379 U.S. 306, 85 S. Ct. 384 (1964). 42 U.S. Code §1994 says in pertinent part:

> "The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited . . . in liquidation of any debt or obligation, or otherwise . . ."

The law prohibits people from contracting themselves into indenture. *Clyatt v. U.S.,* 197 U.S. 207, 215, 25 S. Ct. 429, 430 (1905), and it is no answer that a husband voluntarily entered into the contract of marriage, or that the contract is authorized by state law. *Taylor v. Georgia,* 315 U.S. 25, 62 S. Ct. 415 (1942). Also, *Richardson v.*

Richardson, 112 F.2d 19 (D.C. Cir. 1940), wherein Mr. Justice Vinson's written opinion ruled that the interest of the wife in jointly held property is conditioned on her faithful performance of the marriage vows—thereby divesting the wife of her interest in the real estate and in a bank account.

Question IV

Courts of Appeal are the second highest courts in the state of Ohio and in most instances are the court of last resort as less than five per cent of the cases appealed from the Courts of Appeal are allowed into the Supreme Court of Ohio. Accordingly, if we are truly a nation of law and order, then there is no order to the law when an Ohio appellate court applies "different strokes for different folks" by ignoring the doctrine of *stare decisis* in matters involving its own precedents, statutory procedure and property rights. Counselors at law in Cuyahoga County, Ohio cannot counsel their clients in divorce matters, nor minimize contested trial and appellate litigation, as no attorney knows what the law is at any one point in time. Instead of attempting to minimize appellate litigation by taking firm stances, the appellate court precipitates discord and appeal, resulting in appellate overload. If justice was being dispensed at the trial level by consistent and strong appellate supervision of the trial courts, there would be more settlement, less contested litigation, and less appeal. The rubber stamp excuse used by the appellate court to justify trial court injustices, "That the trial court in domestic relations matters has a wide latitude and a broad discretion." does not suffice as an excuse permitting appellate courts to turn their backs to the wrongs perpetrated in the Star Chamber proceedings of the trial courts. However, when appeal is taken in divorce matters, the appellate decisions are unreported in the ma-

jority of instances making comparison difficult—but Appellant has unearthed the following cases which were cited to the Court of Appeals and were included *en masse* to the Supreme Court of Ohio.

Initially, the law is well stated in *State of Ohio v. George,* 50 Ohio App. 2d 297, 362 N.E.2d 1223 (1975) (Another appellate district):

> "The unreported opinions of a Court of Appeals may be cited by it as authority in support of its decision, and those within its authority are considered to be on notice of the legal determination within such opinions."

A. The position of the Court of Appeals, Cuyahoga County, Ohio, with respect to the eleven factors of §3105.18 was that the trial court had to show by *written* documentation that all eleven factors had been considered.

PRECEDENTS:

1. "The trial courts failure to support its conclusions with sufficient documentation to indicate a consideration of all the elements of R.C. 3105.18 constituted an abuse of discretion."

   Dedic v. Dedic (8th App. Dist. 9/76), No. 35012, Unreported.

2. "The court specifically considers in its judgment entry each of the eleven factors of R.C. Sec. 3105.18 (B) *as it is required to do* in determining alimony and property divisions." (Emphasis added.)

   Thomas v. Thomas (8th App. Dist. 10/78), No. 37714, Unreported.

APPELLANT'S CASE:

> "While R.C. sec. 3105.18 requires the court to examine each factor enumerated therein, it does not require the court to file a journal entry discussing the examination." (App. C, p. A18.)

B. When a litigant had made a timely motion in writing under Rule 52 of the Ohio Rules of Civil Procedure for the trial court to state in writing its findings of fact separately from its conclusions of law, the Court of Appeals had always considered non-compliance by the trial court as reversible error.

PRECEDENTS:

1. *Venable v. Venable* (8th App. Dist. 6/78), No. 38861, Unreported. Reversed and remanded for non-compliance with Rule 52.
2. *Kleinman v. Kleinman* (8th App. Dist. 11/78), No. 37759, Unreported. Reversed and remanded for non-compliance with Rule 52.
3. *Butler v. Butler* (8th App. Dist. 11/78), No. 37637, Unreported.

> "In the case at bar the court below did not observe a clear mandate of Civ. R. 52 and this resulted in reversible error. In addition, this error was prejudicial to appellant."

APPELLANT'S CASE:

The Court of Appeals nimbly tried to side-step this mandate by claiming there was a *decision* in the trial court, rather than a *judgment entry* (App. C, p. A18). There was no decision in the trial court, only an illegal and void Judgment Entry (App. D, p. A22).

"* * * it is not proper for a trial court to both announce its decision and enter judgment by a single writing. The civil rules require that the decision be announced to the parties first and then a judgment entered pursuant thereto."

Shore v. Chester, 40 Ohio App. 2d 412, 321 N.E.2d 614 (1974).

In addition, the Court of Appeals knows the difference between a decision and a judgment entry, see N.B. notation at end of their *decision* (App. C, p. A21). The overruling of Appellant's Motion by the trial court and the approval by the Court of Appeals left a multitude of questions unanswered as indicated at App. D, p. A38.

C. The last opinion by the Supreme Court of Ohio regarding property division, as distinguished from sustenance alimony, was their mandatory dicate in a *per curiam* opinion:

"Courts of common pleas, in allowing alimony, *must* make awards which are reasonable and equitable. R.C. §3105.18." (Emphasis added.)

Conner v. Conner, 170 Ohio St. 85, 162 N.E.2d 852 (1959).

Therein, they said there was no abuse of discretion by the trial court in making a property division of 37½% to the wife and 62½% to the husband. The Court of Appeals had followed that mandate until Appellant's case.

PRECEDENTS:

1. "However, case law suggests that awards of approximately one-third of the marital assets are often ordered in meritorious cases to wives of long standing." *Korner v. Korner* (8th App. Dist. 11/76),

No. 35267 Unreported (wherein Mr. Korner's attorney and the trial judge were the same as in Appellant's case).

2. "* * * the court will reverse an award of alimony where the trial court has abused its discretion. As we held in our recent case of *Anderson v. Anderson* (January 13, 1977), No. 35399 unreported, at page 11: 'Ohio courts have increased inadequate property allocations where such allocations constituted a clear abuse of discretion on the part of the trial court . . .' We hold that the court's award of alimony is an abuse of discretion. *Anderson v. Anderson, supra* . . .

The figures presented above fall far below the 30-38 per cent ran: (sic.) of the marital assets approved as an award by this court in *Korner v. Korner* (Nov. 18, 1976), No. 35267 Unreported."

Yurick v. Yurick (8th App. Dist. 6/78), No. 37336 Unreported.

Interestingly, in the above *Anderson* case, we have the same trial judge as in Appellant's case, and as administrative judge of the Division of Domestic Relations, all remanded cases came to his personal attention.

APPELLANT'S CASE:

All assets to wife. All liabilities to husband.

D. There was no determination by the trial court in its Judgment Entry (App. D, pp, A22-A31), nor in its Order and Judgment Nunc Pro Tunc (App. D, pp. A31-A35), nor in the Opinion of the Court of Appeals as to the total value of the parties' marital property. The precedent position of the Court of Appeals had been that if no marital

property balance sheet was drawn by the trial court, it would be impossible, on review, to determine if the trial court had abused its discretion in making a property division.

PRECEDENTS:

1. "* * * the decree is erroneous requiring a reversal when the trial court decrees a division of property of the parties, and orders an allowance of alimony, without a prior determination as to the reasonable or fair market value of such property."

   Cook v. Cook (8th App. Dist. 10/77), No. 36995 Unreported.

2. "Thus on the face of the judgment entry the court erred in failing to determine the total value of the parties' marital assets."

   Bauer v. Bauer (8th App. Dist. 9/78), No. 37572 Unreported.

3. "The judgment is affirmed in part and reversed in part and remanded for further proceedings to determine (1) the value of the marital assets described above for which no evidence was ascertained at trial; . . ."

   DiSanto v. DiSanto (8th App. Dist. 7/78), No. 38294, Unreported.

APPELLANT'S CASE:

The Judgment Entry of the trial court (App. D, pp. A22-A31) mentions numerous assets with no ascribed value. uses the County Auditors assessed value determined in the early part of 1976 to ascribe a market value to the

marital home which had substantially appreciated by the latter part of 1977 (App. D, p. A28), omits $36,000 in savings accounts of the wife (App. D, p. A38), and there are no sum totals arrived at for the assets and liabilities of the parties. The grossest abuse of all, however, occurs at App. C, p. A20, where the Court of Appeals comes up with the impossible figure of $141,986 "* * * which the Court specifically ruled were not marital assets." Besides having no statutory authority to isolate the wife's "so-called" assets, no mathematical computation of the minimal values set by the trial court in its Judgment Entry comprise that amount—in fact, the total value of all assets for which values were set in the Judgment Entry only total $120,650.

Subsequent to Appellant's case, the Court of Appeals then swung back to its precedent position in *Schwenk v. Schwenk* (8th App. Dist. 11/79), No. 39484, Unreported, tying together the discriminatory treatment complained of in IV A, B and D above:

> "There is insufficient evidence of the fair market value of either the marital home or the property purchased by appellee for use in his business. Therefore, the trial court had no basis upon which to allocate these assets.
>
> * * * * *
>
> Therefore, the trial court's allowance of alimony pursuant to R. C. 3105.18 was based upon insufficient evidence.
>
> * * * * *
>
> However, since appellee did not file a motion for findings of fact and conclusions of law, we are unable to ascertain the trial court's actual findings with respect to the existence of appellant's approximately $122,000.

The relative assets of the parties is one factor in the determination of alimony. R.C. 4105.18(B)(9)."

In defense of its actions, the Court of Appeals justifies injustice by character assassination of the Appellant herein (App. C, p. A16), while giving judicial absolution to the sins of his wife (App. C, p. A20). This is consistent with the 19th century concept involved in fault divorce proceedings wherein the litigants, who at one time loved each other, would have donated parts of their bodies to the other to permit them to live, and probably would have instinctively sacrificed their lives for each other, are compelled by law to engage in "trial by combat" and "trial by emotional ordeal." Forgotten are feelings of compassion, decency, sensitivity and kindness as each litigant is forced to verbally slash at the other in the judicial arena; knowing the outcome will decide who will be rewarded and who will be punished. Usually emerging victorious is the one who has been the most destructive, hurt the other most grievously, and committed the most emotional damage—but no one emerges unwounded. And the wounds that remain do not heal rapidly, influencing and affecting the future lives of the combatants as well as their offspring.

In theory and concept, the practice of fault divorce does not appear to be constitutionally offensive—but if you have lived it, it is a cruel and unusual punishment inflicted by law that borders on being barbaric, inhuman and primitive. THE HAZARDS OF BEING MALE, DR. HERB GOLDBERG, Signet Books, pp. 167-170.

That government should force married couples to become animalistic when divorce comes is totally inconsistent with this Court's position on marriage:

> "* * * Marriage is a coming together for better or worse, hopefully enduring, and intimate to the

> degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our previous discussions."

Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965).

Aside from the emotional hurt of the divorce, Appellant, as an attorney, finds the hurt of a justice-denying court system even more painful. The hurt done by a denial of justice is not easy to describe, but it is nonetheless real. A man's innate sense of dignity; his conception of himself as a person unique, yet part of a community; his feeling of proud security in the impartiality of the law; and the solemness of oaths—when these values are impaired or destroyed, they cannot be measured in money. Yet such a hurt can shatter a man, emotionally and idealistically. And that is the hurt which is done when justice is denied.

Apart from considerations of whether the Court can legitimately avoid hearing an appeal from a state court which properly presents substantial federal questions, Appellant's constitutional claims and the principles upon which they are founded have been abrogated to such extremes by the courts of Ohio as to warrant this Court's intervention under its power of supervision. As was the history in school desegregation matters, the state courts of Alabama and New York in the matters of *Orr* and *Childs, supra,* have circumvented the mandates of this Court—compelling Mr. Childs to file his request for a Writ of Mandamus from this Court. *Childs v. Appellate Division of the Supreme Court of the State of New York,* No. 79-676, October Term, 1979. As Mr. Childs argues therein, either Article VI of the Constitution of the United

States is meaningful and has bite, or state courts can be totally autocratic.

> "Another aspect of the judicial role is the responsibility to be *ahead* of other men. Judges are not entitled to the luxury of shielding themselves behind public opinion or community attitudes, however strongly held those may be. The judiciary thus cannot shift responsibility to the legislatures, the press, women's liberation activists or anyone else. A judge whose opinions on important questions of public policy reflect nothing more than his private estimate of public majority opinion is engaging in journalism, not in jurisprudence." (Emphasis in original.)

J. Johnson & C. Knapp, *Sex Discrimination by Law; A Study in Judicial Perspective*, 46 N.Y.U. LAW REVIEW 675, 747 (1971).

CONCLUSION

There is a compelling urgency to the questions presented by Appellant, and the need for Court action, if the inescapably clear picture of the diminishing traditional American family, the rise in divorce and alternative lifestyles resulting from archaic 19th century statutes and trial court attitudes are not challenged and updated by the socio-economic realities of the 20th century. Stated succinctly, the issue is between government regulated relationships and non-regulated relationships.

In 1950, the divorce rate in Ohio was approximately 28% of the marriage rate; whereas in 1976, the divorce rate had risen to 61% of the marriage rate—affecting the lives of more than 100,000 citizens of Ohio each year. *Department of Health, State of Ohio.* Observations by Appellant in the local Daily Legal News indicate that more than 85% of all divorces filed are by women—Appellant not being able to find any local or national statistics. In 1968, there were 584,000 divorces in America, doubling by 1978 to 1,122,000. BUREAU OF THE CENSUS, *Divorce, Child Custody, and Child Support*, Series P-23, No. 84. From 1970 to 1978, the number of one-parent families has soared from 6,514,000 to 11,489,000. MONTHLY LABOR REVIEW, October, 1979. The most distressing statistic, however, is that the traditional family household of mother, father, and one or more children now accounts for only 32.4% of the nation's households, the lowest percentage ever. BUREAU OF THE CENSUS, *Household and Family Characteristics*, March 1978, Series P-20, No. 340, Issued July, 1979.

The American family has always been considered the basic unit and rockbed of our society. Yet the family as an institution is under such severe attack today that it may be becoming an endangered species. President Carter has called for a White House Conference of Families to be held in mid-1980 to study the current problems facing the American family. Senator Paul Laxalt (R-Nev.) introduced the "Family Protection Act" into the U.S. Senate on September 24, 1979 based on the premise that "* * * a stable and healthy American family is at the foundation of a strong American society." Stacked-card divorces for women, and the wising-up of unmarried men cannot be measured as an influencing factor, but the inference is extremely suggestive.

To postpone a ion until the Equal Rights Amendment is resolved would serve no purpose. The ERA is superfluous: everything it stipulates is already provided by the Fourteenth Amendment. It is tantamount to left-handed folk demanding an Amendment because the Constitution

is silent about their rights and the afflictions they suffer from a society historically geared to right-handed folk. Of interest is the great silence from the camps of the feminists regarding inequality in divorce and alimony matters.

It is imperative that the Court act to decelerate the trend that has continued to gain momentum to the detriment of our social structure. Patriarchy is dead—matriarchy prevails; and it is not working. And the "tagtail" men who entrench matriarchy deeper, instead of striving for the working medium that is somewhere in between, do a disservice to society in all its aspects and ramifications. That there is an incontrovertible correlation between fatherless homes and crime, homosexuality, constantly increasing need for governmental welfare, and emotional disturbances, is well documented by DR. DANIEL AMNUS, BACK TO PATRIARCHY, Arlington House, New Rochelle, N.Y., pp. 66-79.

Herein, the Appellant has packaged basic causes and issues that go to the roots of our current social and family breakdown: the attractiveness of divorce for women vs. the attractiveness of de facto marital relationships for men. When the rewards and penalties are equalized between the two concepts: then, at least, there is hope for stabilization. Lastly public image-wise and introspectively, there is the salient problem of the already low repute in which attorneys and our court systems are held. Indeed, Appellant would be inexcusably naive if he did not entertain his own presumptions as to what happened to him in the courts of Ohio. If attorneys are truly the servants of the court, then there is a helpless feeling of betrayal when the master that has been served faithfully with respect, integrity, and near reverence for 27 years gives cause for the raising of serious questions regarding whether that loyalty and trust has been misplaced.

Just released are the results of a workshop attended by 28 Ohio Domestic Relations Judges, as reported in the *Ohio Bar* of the Ohio State Bar Association, December 3, 1979 issue. Given a hypothetical situation wherein the parties had $54,800 in assets and $18,775 in debts, or a net worth of $36,025—the net value of assets awarded to the wife ranged from a high of $45,900 to a low of $2,625—tempered by increases or decreases in sustenance alimony in some cases. Pertinent excerpts from the article stated:

"It is well recognized that uncertainty (unpredictability) foments litigation, frustrates parties and diminishes respect for the law."

* * * * *

"Notice that the revised statute (§3105.18) still does not specifically deal with the authority of the court to divide property."

* * * * *

"Although the statutory guidelines have focused the trial court's attention upon appropriate considerations, experience, nationally and across Ohio, suggests that uniformity or predictability is still wanting."

* * * * *

"It is also apparent that recent legislative guidelines and case decisions have done little, if anything, to bring about standardization or uniformity."

* * * * *

"When the judges confronted the wide discrepancies in thinking concerning division of property and alimony, they agreed to the need for more specific, meaningful guidelines in the difficult decision concerning the financial implications of divorce. It was the further consensus that the 1974 guidelines (§3105.18) for

alimony gave little assistance, and sometimes seem totally inappropriate." (Emphasis added.)

Plenary consideration with briefs on the merits and oral arguments for the resolution of the questions presented is prayed for by Appellant—for his sake, and the sake of the millions of lives that are touched by divorce each year.

Respectfully submitted,

SANFORD J. BERGER
1836 Euclid Avenue, Room 305
Cleveland, Ohio 44115
Phone: (216) 781-5950
Counsel for Appellant (Pro Se)

APPENDIX A

Notice of Appeal to the Supreme Court of the United States

(Filed in the Cuyahoga County Court of Appeals November 21, 1979)

No. 38527
IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

SANFORD J. BERGER,
Appellant

VS.

BERTINE M. BERGER,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Sanford J. Berger, the Appellant above named, hereby appeals to the Supreme Court of the United States from the order of The Supreme Court of the State of Ohio denying his Motion For Rehearing, entered in this action on November 2, 1979.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ SANFORD J. BERGER
1836 Euclid Avenue, Room 305
Cleveland, Ohio 44115
Phone: (216) 731-5950
Attorney for Appellant (Pro Se)

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 1979, I have served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Alfred Palay and Richard Eisenberg, of Zimmerman, Caticchio, Eisenberg and Palay, 5001 Mayfield Road, Lyndhurst, Ohio 44124, by mailing such copy by United States mail, postage prepaid and properly addressed, and that said Attorneys are counsel for the Appellee herein.

/s/ SANFORD J. BERGER

APPENDIX B

Order of the Supreme Court of Ohio Denying Motion for Rehearing

(Dated November 2, 1979)

No. 79-695

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 15th day of November, 1979.

THOMAS L. STARTZMAN, *Clerk.*
By /s/ SAM F. JENKINS, *Deputy.*

Order of the Supreme Court of Ohio
Dismissing Appeal

(Dated September 13, 1979)

No. 79-695
THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 15th day of November 1979.

THOMAS L. STARTZMAN, *Clerk.*
/s/ SAM F. JENKINS, *Deputy.*

Order of the Supreme Court of Ohio
Overruling Motion to Certify

(Dated September 13, 1979)

No. 79-695
THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Sanford J. Berger.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 15th day of November 1979.

THOMAS L. STARTZMAN, *Clerk.*
/s/ SAM F. JENKINS, *Deputy.*

Federal Constitutional Questions Proffered by Appellant to the Supreme Court of Ohio in His Memorandum in Support of Jurisdiction

Proposition of Law No. 1:

Ohio Revised Code Sec. 3103.03 Entitled "Duty of Husband to Support Family" Accords Different Treatment on the Basis of Sex, is Vague, and Is in Violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

A. The Statute Denys Equal Protection to Men; Is Discriminatory; and Orders the Taking of Their Property Without Due Process of Law.

B. The Statute is Vague and Indefinite.

Proposition of Law No. 2:

The Language of Ohio Revised Code Sec. 3105.18 is Vague, Indefinite, Overbroad, and Sexist Oriented, Preventing Reasonable Judicial Interpretation Thereof in Violation of the Fourteenth Amendment of the United States Constitution.

A. The Statute is Vague, Indefinite and Overbroad.

B. Sec. 3103.03 Is the Foundation Upon Which Sec. 3105.18 Has Been Constructed. If Sec. 3103.03 Cannot Stand Constitutionally, Then the Structure Which is Sec. 3105.18 Crumbles With It, as Sec. 3105.18 is Sexist Oriented as Applied to Existing Marriages.

C. Sec. 3105.18 Is Vague on Its Face for Failure to Distinguish Between Alimony as Part of a Property Division, and Alimony for Sustenance and Support; Double Ambiguity Rendering a Statute Void for Vagueness.

Proposition of Law No. 3:

If a Wife Abandons Her Husband Without Cause to Cohabit With Another Man, Files for Divorce, and Continues to Cohabit With the Other Man in His One Bedroom Apartment Uninterruptedly for a Period of 22 Months Prior to the Divorce Decree, the Wife Has Established a "Defacto" Marriage With the Other Man, and the Awarding of All of the Property of the 27 Year Marriage to the Wife, Estimated at $250,000, Does Not Constitute a Division of Property or an Award of Alimony—But, Rather, a Gratuitous "Quasi-Wedding Present" to the Wife and Her Defacto Husband by the Trial Court, in Violation of the Thirteenth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. 4:

An Ohio Court of Appeals Use of the Carte Blanche License Words, "The Trial Judge in Domestic Relations Matters Has a Wide Latitude and Broad Discretion" Is Not Legally Sufficient Justification for an Appellate Court to Ignore Its Own Precedents; and Where There Are Similar or Identical Fact Situations Presented to the Appellate Court, and the Court's Precedents are Cited to the Court, and the Appellate Court Holds Differently from Its Precedents Without Distinguishing, Modifying or Reversing Its Precedents, It is a Violation of the Equal Protection Guaranteed to an Appellate Litigant Citizen by the Fourteenth Amendment of the United States Constitution.

APPENDIX C

Journal Entry of the Court of Appeals Overruling Motion to Certify

(Dated May 7, 1979)

Court of Appeals No. 38527 & 38734

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER, *et al.*,
Appellants.

JOURNAL ENTRY

Motion by appellant to certify cases to the Ohio Supreme Court is overruled. Exc.

/s/ JOHN V. CORRIGAN
Presiding Judge

CORRIGAN, *P. J.*, PARRINO, *C. J.*, JACKSON, *J.* concur.

Journal Entry of the Court of Appeals Overruling Motion for Reconsideration

(Dated April 5, 1979)

Court of Appeals No. 38734 & 38527

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY
OF CUYAHOGA

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER, *et al.*,
Appellants.

JOURNAL ENTRY

Motion by appellant for reconsideration is overruled. Exc.

/s/ JOHN V. CORRIGAN
Presiding Judge

CORRIGAN, *P. J.*, PARRINO, *C. J.*, JACKSON, *J.*, concur.

Journal Entry and Opinion of the Court of Appeals

(Dated March 22, 1979)
(Journalized April 5, 1979)

No. 38527 & 38734
COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER, *et al.*,
Appellants.

JOURNAL ENTRY AND OPINION

CORRIGAN, *J.*:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed, in part; and reversed, in part. Each assignment of error was reviewed and upon review the following disposition made:

This case is an appeal from a judgment of the Domestic Relations Division of the Cuyahoga County Common Pleas Court which awarded appellee, Bertine Berger, a divorce from one of the appellants, Sanford Berger. The other appellant, Ida Berger, is Sanford Berger's mother.

The parties were married on August 6, 1950. Since the marriage, the parties lived off the husband's meager income[1] and loans or gifts from both parties' parents (Tr. 290, 451). At trial, there was conflicting evidence regarding each party's alleged extramarital conduct and concerning whether certain assets were personal or marital property. On September 23, 1977, the Court filed a nine-page journal entry which resolved most issues in favor of appellee. The entry found appellant guilty of gross neglect of duty, granted appellee a divorce, and awarded her appellant's one-half interest in the family residence as alimony. Appellee also received all household furniture and goods, the automobile registered in her name, and various assets that the Court determined were not marital property.

The judgment entry also declared void, under the doctrine of lis pendens, two judgments rendered by the Cuyahoga County Common Pleas Court: Cases Nos. 76-955061 and 76-955062. Those judgments were taken by Ida Berger, Sanford Berger's mother, on a complaint filed four-and-a-half months after the instant action commenced.

The complaint was based upon two cognovit notes executed by Sanford Berger in favor of his mother, and was filed April 16, 1976. Three days later, on April 19, Sanford Berger confessed judgment and the court rendered judgments, totalling Forty-Nine Thousand Two Hundred Thirty-Eight Dollars and Twenty-Five Cents ($49,238.25). On that day Ida Berger filed judgment liens against the marital property, which was owned jointly by appellee and Sanford Berger.

The Court held that, because the instant suit was pending when the liens were filed, the marital property was under the prior jurisdiction of the Domestic Relations

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1. See plaintiff's exhibits K through O.

Court and that the liens attached by the Common Pleas Court therefore had no force or effect. The Court also ruled that the notes were really gifts rather than loans, that the judgments were taken to deprive appellee of a fair division of the marital property, and declared that the judgments were null and void.

Appellants' motion for new trial was overruled by the Court, and, on appeal, they assign eight errors:

I. APPELLEE, RATHER THAN APPELLANT, WAS GUILTY OF GROSS NEGLECT OF DUTY, AND THE TRIAL COURT'S FINDING TO THE CONTRARY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND ITS ENTRY OF JUDGMENT ON SUCH GROUND CONSTITUTED AN ABUSE OF DISCRETION.

II. ASSUMING *ARGUENDO* THAT THE FACTS SUPPORT THE TRIAL COURT'S CONCLUSION WITH RESPECT TO ITS FINDING OF FAULT - GROSS NEGLECT OF DUTY - AS TO THE DEFENDANT-APPELLANT, THE TRIAL COURT ERRED IN ITS FAILURE TO CONSIDER AND APPLY THE DOCTRINES OF RECRIMINATION AND CONDONATION; OR AT THE VERY LEAST, THE DOCTRINE OF "UNCLEAN HANDS" THEREBY DEFEATING ANY ULTIMATE FINDING IN FAVOR OF THE PLAINTIFF-APPELLEE.

III. IN ITS AWARD OF THE FAMILY RESIDENCE TO APPELLEE AS ALIMONY, THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER ALL ELEVEN FACTORS ENUMERATED IN OHIO REV. CODE SEC. 3105.18.

IV. THE COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE TIMELY MOTION FOR SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY APPELLANT IN ACCORDANCE WITH RULE 52 OF THE OHIO RULES OF CIVIL PROCEDURE AND RULE 19B OF THE COMMON PLEAS COURT.

V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DETERMINING THAT THE U.S. TREASURY NOTES HELD BY APPELLEE'S MOTHER WERE NOT PART OF THE MARITAL ASSETS OF THE PARTIES.

VI. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DETERMINING THAT MONEY PASSING BETWEEN APPELLANT'S PARENTS AND APPELLANT WAS GIFTS AND NOT BONA FIDE LOANS.

VII. THE DIVORCE LAWS, AS APPLIED BY THE TRIAL COURT IN THE STATE OF OHIO IN THE INSTANT CASE, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT: AND THE TRIAL COURT'S APPLICATION THEREOF CONSTITUTES SLAVERY AND PEONAGE IN VIOLATION OF THE THIRTEENTH AMENDMENT OF THE U.S. CONSTITUTION, ARTICLE I, SEC. 6 OF THE OHIO CONSTITUTION, THE LAWS OF THE UNITED STATES AND THE STATE OF OHIO.

VIII. THE COURT ERRED AND ABUSED ITS DISCRETION IN DECLARING THE TWO JUDGMENTS OF IDA BERGER: ONE IN THE

AMOUNT OF $39,367.35 AND THE OTHER IN THE AMOUNT OF $10,081.00, TO BE NULL, VOID AND OF NO EFFECT.

I.

The sixth and eighth assignments of error are the only assignments concerning Ida Berger and are therefore addressed first. The sixth assignment of error challenges the Court's finding that the monies passing between Ida and Sanford Berger were gifts, not loans; the eighth assignment of error asserts that the liens and judgments could be challenged only through a motion from relief from judgment under Civil Rule 60(B).

The doctrine of *lis pendens* is set forth in R.C. §2703.26.[2] Under this doctrine, a holder of a cognovit note may not obtain a lien on any land or property which has been described in a divorce complaint filed before the lien. *Cook v. Mozer* (1923), 108 Ohio St. 30; *Foundation Savings & Loan Co. v. Rosenbaum* (1960), 113 Ohio App. 501. In the instant case, appellee's divorce complaint was filed prior to the filing of the liens and contained a description of the marital property. The Court was therefore proper in declaring the liens null and void.

However, the Court exceeded its authority in vacating the judgments obtained by Ida Berger against Sanford Berger; not only did the Court lack jurisdiction to attack collaterally these judgments, but also the issue was not raised by either of the parties to those judgments.

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2. That statute states:

"§2703.26 *Lis pendens in general.*

"When summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. *While pending, no interest can be acquired by third persons in the subject of the action as against the plaintiff's title.*" (emphasis added)

Therefore, appellants' sixth assignment of error is well taken and their eighth assignment of error is overruled; the judgment declaring the liens null and void is affirmed, but the judgment voiding the judgments in Common Pleas Cases Nos. 76-955061 and 76-955062 is reversed and those judgments are ordered reinstated.

II.

Appellant's[3] first assignment of error concerns the Court's finding that he was guilty of gross neglect of duty. The transcript is replete with testimony inferring that both parties engaged in extramarital liaisons. However, under Civil Rule 75(L) this testimony can only serve as grounds for divorce when it is supported by credible evidence. In addition, our review of the trial court's finding of gross neglect of duty is limited; the question is factual in nature and,

> "[W]hen there is an issue of fact submitted to the trier of fact, whether it be a court or jury, and there is credible evidence to support the finding or jury verdict and reasonable minds could come to different conclusions regarding the fact question, a Court of Appeals will not interfere with the verdict and resulting judgment." *Pokorny v. Local 310* (1973), 35 Ohio App. 2d 178, 182.

Moreover, a determination of what conduct constitutes "gross neglect of duty" depends on the facts and circumstances of each case, *Porter, Exr. v. Lerch* (1934), 129 Ohio St. 47, 63, and the trial court is vested with broad discretion in determining this question. *Buess v. Buess* (1950), 89 Ohio App. 37, 41-42. Thus, if appellee presented

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3. Hereafter, because we have disposed of all issues raised by appellant, Ida Berger, the term "appellant" refers to Sanford Berger only.

evidence of appellant's conduct which the Court, in its discretion, might have determined constituted gross neglect of duty, and that evidence was reliably corroborated, we are required to affirm the determination.

Upon careful review of the record, we find that appellee presented ample corroborated evidence to support the Court's finding. Beginning in 1971, appellant dated a woman who did occasional typing for his law practice (Tr. 132-133). He dated her through late 1975 (Tr. 136), taking her to lunch several times per week (Tr. 123), often driving her to and from work (Tr. 126) and visiting her at her apartment about once every three weeks (Tr. 128-130). In addition, appellant admitted dating a large number of other women, some of them frequently (*see, e.g.* Tr. 54-56, 57-58, 65) and others only once or twice (*see, e.g.* Tr. 48, 53-54, 57, 60-66).

Other evidence was presented to show appellant's neglectful conduct: he closed all his wife's charge accounts, forcing her to obtain money for necessities from her parents, refused to pay her medical bills, despite a court order requiring him to do so, and forced his children to obtain money for their college educations from their maternal grandmother. (Tr. 414-415, 462, 464-468). These actions, combined with appellant's penchant for dating and spending money on women other than his wife, support the Court's finding. The first assignment of error is overruled.

III.

The second assignment of error asserts that the Court should have considered the doctrines of recrimination, condonation and "unclean hands". However, in 1974, the legislature amended R.C. §3105.10(C) to state: "A plea of condonation or recrimination is not a bar to a divorce."

Appellant argues that, despite this statutory language, the Court, "in its sound discretion may apply these doctrines in appropriate factual situations," and that courts should be permitted to apply the doctrine of "comparative rectitude". While we agree generally with this proposition, we note that consideration of these factors lies within the trial court's discretion. In the case at bar, in light of the conduct of both parties, we cannot say that the Court abused its discretion in not applying these doctrines. The second assignment of error is therefore overruled.

IV.

The third assignment of error challenges the Court's decision to award to appellee as alimony appellant's one-half interest in the family residence. The basis for this challenge is appellant's assertion that the Court did not consider all factors enumerated in R.C. §3105.18(B). Appellant does not contend, nor could he reasonably do so, that there was a lack of evidence before the Court on any of the R.C. §3105.18(B) factors; rather, his argument is that the Court did not consider the evidence relevant to several of the factors because it did not discuss each factor in its journal entry.

While appellant is correct that R.C. §3105.18(B) requires the trial court to consider the eleven enumerated factors, the same statute gives the court wide latitude and discretion in awarding alimony. *Popovic v. Popovic* (1975), 45 Ohio App.2d 57, 63. Trial in the case at bar lasted three days, the transcript of the trial is nearly 1,000 pages long, and well over 100 exhibits were offered into evidence. There is no question that a significant amount of evidence on each of the eleven factors was before the trial court.

While R.C. §3105.18(B) requires the court to examine each factor enumerated therein, it does not require the court to file a journal entry discussing that examination. We therefore hold that the Court did not abuse its discretion in awarding appellee alimony without extensively discussing all the considerations which led to that award. The third assignment of error is overruled.

V.

The fourth assignment of error asserts that the Court violated Local Rule 19(B) when it overruled appellant's motion for findings of fact and conclusions of law. While Local Rule 19 does require the trial court to furnish findings and conclusions when requested by a party, Civil Rule 52 provides:

> "When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.
>
> "Findings of fact and conclusions of law required by this rule and by Rule 41(B)(2) are unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56.
>
> "*An opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule and Rule 41(B) (2).*"

In the case at bar, the Court filed a nine page journal entry, followed by a four page *nunc pro tunc* entry; both entries contained factual findings and legal conclusions.

We hold that these entries satisfied the requirements for findings of fact and conclusions of law under Local Rule 19(B). The fourth assignment of error is overruled.

VI.

The fifth assignment of error challenges the Court's finding that $50,000 of United States Treasury Notes belonged to appellee's mother. The notes were purchased with money received from the sale of appellee's father's business; they were held in appellee's mother's name, although appellee received the interest on the notes (Tr. 185-186). Appellant's argument is that the evidence establishing the mother's ownership was conflicting and that a more reasonable view of the evidence is that the mother "held the bearer instruments as custodian for appellee and her grandchildren".

Appellant is correct that the evidence regarding ownership of the notes is in conflict. However, the trial court resolved that conflicting evidence by finding the mother to be the owner, and this Court cannot reverse that finding because there is credible evidence to support it. *State v. DeHass* (1967), 10 Ohio St.2d 230; *Pokorny v. Local 310, supra.* The fifth assignment of error is overruled.

VII.

In his seventh assignment of error, appellant argues that, in awarding appellee a divorce and substantial alimony, the trial court violated his right to equal protection of the laws and subjected him to peonage and slavery. Appellant attempts to support this argument by asserting that appellee had established a "de-facto marriage"[4] with

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4. At oral argument, appellant was unable to place a legal definition on the term "de facto marriage", but admitted that the wife's relationship with the second man did not establish a common law marriage.

another man and that the Court awarded appellant only Nine Hundred Dollars ($900) worth of "total marital assets comprising $220,337".

We first note that the evidence regarding appellee's relationship with the other man is conflicting. Although appellee admitted that she moved into the second man's apartment, she testified that she did so because she had undergone major surgery and required constant care, and because appellant was unwilling or unable to provide that care (Tr. 256-259). This was corroborated by the fact that appellant visited her only twice during her ten day hospital stay, and by appellant's admission that she was staying at the second man's apartment to recuperate (Tr. 10, 112). Indeed, during much of this stay, appellee had an abdominal drainage tube in her, and it would not be unreasonable to assume that she avoided adulterous entanglements throughout that period.

Nor does the claimed disproportionate split in marital assets constitute grounds for reversal. Appellant claims that the marital assets totalled $220,337; he arrives at this figure by including in the total stock shares, antiques, gifts from appellee's mother—items totalling $141,986, which the Court specifically ruled were not marital assets. The marital property split and the alimony award are not, in light of the facts of this case, so grossly disproportionate that they constitute a violation of appellant's constitutional rights. The seventh assignment of error is overruled.

Accordingly, the judgment of the trial court voiding the judgments in Common Pleas Cases Nos. 76-955061 and 76-955062 is reversed and those judgments are reinstated. In all other respects, the judgment below is affirmed.

It is ordered that appellee(s) recover of appellant(s) her costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JOHN V. CORRIGAN
Judge

PARRINO, *C.J.*, JACKSON, *J.*, concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (See Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it becomes the judgment and order of the court and time period for review will begin to run.

Federal Constitutional Question Assigned As Error to the Court of Appeals, Eighth District, County of Cuyahoga, Ohio

VII. THE DIVORCE LAWS, AS APPLIED BY THE TRIAL COURT IN THE STATE OF OHIO IN THE INSTANT CASE, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT: AND THE TRIAL COURT'S APPLICATION THEREOF CONSTITUTES SLAVERY AND PEONAGE IN VIOLATION OF THE THIRTEENTH AMENDMENT OF THE U.S. CONSTITUTION, ARTICLE I, SEC. 6 OF THE OHIO CONSTITUTION, THE LAWS OF THE UNITED STATES AND THE STATE OF OHIO.

APPENDIX D

**Judgment Entry of the Court of Common Pleas,
Division of Domestic Relations,
Cuyahoga County, Ohio**

(Filed September 23, 1977)

Case Number: 75 D 68055

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
CUYAHOGA COUNTY, OHIO

BERTINE M. BERGER,
Plaintiff,

v.

SANFORD J. BERGER, *et al.*,
Defendants.

JUDGMENT ENTRY

This cause came on for hearing on the 28th day of June, 1977, at which time evidence was produced and the case continued, by agreement of the parties, for further evidence from time to time until concluded, on the complaint of the plaintiff, the answer and cross complaint of the defendant, Sanford J. Berger, the answer of Central National Bank, the answer of North American Life and Casualty Company, the answer of Philadelphia Life Insurance Company, the amended complaint of the plaintiff, the amended answer and amended cross complaint of the defendant, Sanford J. Berger, the separate answer of new party defendant, Belle Benjamin, the answer and

counter claim of new party defendant, Raymond Gardini, the motion to show cause filed by the plaintiff concerning the failure of the defendant, Sanford J. Berger, to comply with the award for temporary alimony and the motion to show cause by plaintiff concerning the removal of certain antiques by the defendant, Sanford J. Berger, the pre-trial statement and supplemental pre-trial statement of the plaintiff, the pre-trial statement and the supplemental pre-trial statement of the defendant, Sanford J. Berger, and the evidence, including numerous exhibits; the Court finds that the defendant, Sanford J. Berger was duly served with process personally according to law and the plaintiff was duly served with process personally according to law. The Court finds that the defendant, Ida Berger, was duly served with process personally according to law and that she has failed and neglected to file an answer or other pleading in this matter.

Upon the evidence and due consideration thereof, the Court finds that the plaintiff was a resident of the State of Ohio for more than six months immediately preceding the filing of her complaint; that the parties were married on the sixth day of August, 1950, at Cleveland, Ohio; and that two (2) children were born as issue of said marriage, to wit: Bonnie Berger, born April 10, 1956, and Bradley Berger, born February 13, 1953.

The Court further finds that the defendant, Sanford J. Berger, has been guilty of gross neglect of duty and that by reason thereof, the plaintiff is entitled to a divorce as prayed for.

The Court further finds that the plaintiff, Bertine M. Berger, and the defendant, Sanford J. Berger, each own an individual one-half (1/2) interest in and to the family residence, located at 25515 Bryden Road, Beachwood, Ohio, and more fully described as follows, to wit:

Known as being Sublot No. 221 in a Re-Allotment of The Van Sweringen Co.'s Shaker Country Estates Subdivision No. 32 of part of Original Warrensville Township Lots NOs. 38, 39, 48 and 49, as shown by the recorded plat in Volume 139 of Maps, Page 16 of Cuyahoga County Records, and being 100 feet front on the Northeasterly side of Bryden Road, and extending back 214.77 feet on the Northwesterly line, 245 feet on the Southeasterly line and being 131.82 feet wide in the rear, as appears by said plat, be the same more or less, but subject to all legal highways. Permanent Parcel #742-17-7;

and that said residence is free and clear of any mortgage or lien, except liens of record in the name of Ida Berger, and current taxes.

The Court further finds that the plaintiff is the owner of 511 shares of common stock of Bethlehem Steel Corporation, 31 shares of common stock of Monsanto Company and a collection of antiques, itemized and listed on pages 1 to 6 inclusive of the supplemental pre-trial statement of plaintiff; that these assets are not marital assets for the reason that plaintiff acquired same from funds given to her by her parents, and that the defendant did not contribute to any funds to purchase said assets.

The Court further finds that the defendant, Sanford J. Berger, is and has been a practicing attorney for some twenty-five (25) years and that he is also a duly licensed real estate broker and securities broker in the State of Ohio.

The Court further finds that the plaintiff is the owner of a 1972 Plymouth 4 door sedan, valued at approximately $750.00, purchased new by her parents.

The Court further finds that the defendant, Sanford J. Berger, is the owner of two (2) automobiles, a 1973 Subaru and a 1975 Saab; that the Subaru has a value of approximately $900.00, and the Saab has a value of approximately $4,000.00; that the Saab was purchased in said defendant's name for his son, Bradley Berger, with funds provided by plaintiff's parents.

The Court further finds that the defendant is in the arrears of Court order for necessary medical expenses ($1,758.83), the taxes and insurance and any and all notes or loans secured by mortgage of jointly owned premises located at 25515 Bryden Road, Beachwood, Ohio and save plaintiff harmless, and in addition, that defendant pay the heat and utilities, excluding long distant phone calls, for said dwelling for so long as he resides therein.

The Court further finds that defendant, Sanford J. Berger, has failed to comply with this order in that he failed to pay any medical and dental expenses incurred by the plaintiff during the pendency of this action in the amount of $1,758.83.

The Court further finds that the complaint herein was filed on the 3rd day of December, 1975, at 2:48 p.m., and that on the same day, this Court granted the restraining order requested in the complaint, and restrained the defendant, Sanford J. Berger, from removing, selling, assigning, transferring, encumbering, mortgaging or otherwise disposing of any of his assets.

The Court further finds that on the 5th day of December, 1975, the defendant, Sanford J. Berger, was duly served with summons, personally, and with notice of the restraining order issued in this action.

The Court further finds that on the 15th day of April, 1976, a complaint was filed against defendant, Sanford

J. Berger, on behalf of Ida Berger in the Court of Common Pleas, Cuyahoga County, Ohio, Case No. 76-955062, alleging that she was the holder of a cognovit note from her son, the defendant, Sanford J. Berger, dated March 13, 1975, for the sum of $39,157.35 with interest at 6% per annum from March 1, 1976, and further alleging that no payments have been made thereon and that there was due and owing to her from said defendant, Sanford J. Berger, the sum of $39,157.35 with interest at 6% from March 1, 1976. (See Exhibit "4" in defendant's supplemental pre-trial statement referring to Case No. 76-955062 of this Court.) An answer confessing judgment was filed on behalf of this defendant and judgment rendered accordingly.

The Court further finds that on the 19th day of April, 1976, a certificate of judgment lien relative to said judgment was filed in the office of the Clerk of Courts of Cuyahoga County and recorded in Volume 198, Page 131-C.

The Court further finds that on the 19th day of April, cognovit note signed by the defendant, Sanford J. Berger, payable to Ida Berger in the amount of $10,000.00, was also reduced to judgment in Case No. 76-955061 for the sum of $10,081.00.

The Court further finds that on the 19th day of April, 1976, a certificate of judgment lien relative to said judgment was filed in the office of the Clerk of Courts of Cuyahoga County, Ohio and recorded in Volume 198, Page 131-B.

The Court further finds that by reason of the recording of said judgment liens, said judgment liens became a lien against the premises hereinbefore described, owned by the defendant, Sanford J. Berger, and said defendant, Sanford J. Berger, thereby encumbered his interest in said premises contrary to and in violation of the restraining

order heretofore allowed herein on the 3rd day of December, 1975, and that if said liens were permitted to remain on said premises, the plaintiff would be deprived of a fair and just division of the property herein.

The Court further finds that these divorce proceedings were pending at the time said judgments were taken and said liens were filed, and that by reason of this Court's prior jurisdiction over said real property, the subsequent filing of the liens thereon was subject to rule of lis pendens and, therefore, was of no force and effect.

The Court further finds from the preponderance of the evidence that said notes were without consideration because there was no evidence that the defendant, Sanford J. Berger, borrowed any money from said defendant, Ida Berger; that the defendant, Sanford J. Berger, never delivered said notes to Ida Berger; that said defendant, Sanford J. Berger, and not Ida Berger, engaged an attorney to reduce said notes to judgment and to file said judgment liens; and that if any moneys were given to defendant, Sanford J. Berger, by new defendant, Ida Berger, same were gifts rather than loans, and that by reason thereof, said judgments were taken to deprive the plaintiff of a fair and just division of the property herein and should, therefore, be declared null, void and of no effect.

The Court further finds that by a preponderance of the evidence, that the new defendant, Belle J. Benjamin, was and is now the owner of $50,000.00 of U.S. Treasury notes; that said notes were purchased with her own funds; that despite the fact that she gave the amount of interest coupons on $30,000.00 of said notes to plaintiff, and on $10,000.00 to each of her two grandchildren, Bradley Berger and Bonnie Berger, for several years, did not change the ownership of said notes, even though said beneficiaries of her kindness reported said income on their tax returns.

The Court further finds that said Belle J. Benjamin has been in possession of said Treasury notes from the time she purchased same to the present; that neither the plaintiff nor the defendant, Sanford J. Berger, has any right, title or interest in said notes, and by reason of the foregoing, the said Treasury notes have been and remain the sole property of the new party defendant, Belle J. Benjamin.

The Court further finds that the marital home at 25515 Bryden Road, Beachwood, Ohio has a current market value of approximately $65,000.00; that said home is assessed on the tax duplicate at a value of $22,600.00. (See Exhibit No. "5" of defendant's supplemental pre-trial statement, which would indicate a current market value of at least $65,000.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff be and she is hereby granted a divorce from the defendant, Sanford J. Berger, and that the marriage contract heretofore existing between the parties be and is hereby dissolved and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintifff, Bertine M. Berger, be and she is hereby awarded the family residence, located at 25515 Bryden Road, Beachwood, Ohio, heretofore described, as alimony, and the defendant, Sanford J. Berger, is hereby ordered to execute a deed in favor of the plaintiff to said property, free and clear of any liens or encumbrances, except current taxes and assessments not yet due or payable; that upon his failure to do so within five (5) days of the signing hereof, the decree shall operate as a conveyance thereof and the Clerk is directed to certify so much as is necessary of this decree to effectuate such conveyance to the County Auditor and County Recorder.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff shall be awarded all of the household furniture, fixtures, appliances, goods and effects located in the marital home at 25515 Bryden Road, Beachwood, Ohio, except the personal effects and belongings of the defendant, Sanford J. Berger.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Sanford J. Berger, pay, and save the plaintiff harmless, from all medical and dental expenses incurred by the plaintiff prior to the date of this entry, to wit: $1,758.83.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all shares of stock in the name of Bertine M. Berger, to wit: 511 shares of Bethelehem Steel Corporation and 31 shares of Monsanto Company, be and hereby are awarded to her, free from any claim of the defendant, Sanford J. Berger.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff shall be awarded all the antique collection acquired by her and identified on Pages 1 to 6 inclusive in the supplemental pre-trial statement of the plaintiff, which list is incorporated herein by reference, and the defendant, Sanford J. Berger, be and he is hereby ordered to deliver all of said items to her immediately, including those items hereinbefore removed by him.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff be and she is hereby awarded the Plymouth automobile in her name, and the defendant, Sanford J. Berger, be and he is awarded the Subaru and Saab in his name.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff be and hereby is awarded all her jewelry.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all U.S. Treasury notes in the possession of Belle J. Benjamin are her property and remain the same free of any claim of the defendant, Sanford J. Berger.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgments in favor of Ida Berger, against Sanford J. Berger, in Case Nos. 76-955061 and 76-955062, be and are hereby declared to be null, void and of no effect, and that the judgment liens of the new defendant, Ida Berger, recorded in Judgment Lien Docket 198, Page 131-B and Judgment Lien Docket 198, Page 131-C in the office of the Clerk of Courts of Cuyahoga County, Ohio, be and hereby are set aside, and said Clerk of Courts is hereby directed to make a notation accordingly on the margins of the docket of Case Nos. 76-955061 and 76-955062 and the Judgment Lien Docket 198 at Pages 131-B and 131-C.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all restraining orders heretofore issued be and are hereby released, dissolved and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff deliver to the defendant, Sanford J. Berger, all insurance policies on his life now in her possession.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Sanford J. Berger, vacate the family residence at 25515 Bryden Road, Beachwood, Ohio, intact and without causing any damage thereto, within five (5) days of the signing hereof, and upon his failure to do so, he shall be cited for contempt.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party pay their own attorney fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Sanford J. Berger, pay the costs of these proceedings for which judgment is rendered.

/s/ JOHN L. MAXWELL
Judge

Order and Judgment Nunc Pro Tunc Entry of the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio

(Filed October 26, 1977)

Case No. 75 D-68055
IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
CUYAHOGA COUNTY, OHIO
Judge John L. Maxwell

BERTINE M. BERGER,
Plaintiff,

v.

SANFORD J. BERGER, *et al.*,
Defendants.

ORDER AND JUDGMENT NUNC PRO TUNC ENTRY

The separate issues in the above entitled action presented by the Amended Complaint of the plaintiff and the Amended Answer and Amended Cross-Claim of defendant Sanford J. Berger and Answer of plaintiff to Amended Cross-Claim (Counter-Claim) of defendant Sanford J. Berger, Answer of Central National Bank, the Answer of North American Life and Casualty Company, the Answer

of Philadelphia Life Insurance Company, the Separate Answer of new party defendant, Belle Benjamin, the Answer of Ida Berger to Amended Complaint and the Answer of New Party Defendant, Raymond Gardini, which were heretofore severed from the remaining issues between the defendant Sanford J. Berger and the new party defendant, Raymond Gardini, came on to be heard before the Court, and were tried on the 28th day of June, 1977, at which time evidence was produced and the case continued, by agreement of the parties, for further evidence from time to time until concluded, and thereupon, upon consideration thereof, and after argument by counsel, and it being expressly determined that there is no just reason for delay and expressly directed that final judgment upon the separated issues be entered, it is

ORDERED, ADJUDGED AND DECREED:

1. The Court expressly determining under Rule 54(B), Ohio Rules of Civil Procedure that there is no just reason for delay in entering final judgment upon the pleadings heretofore severed and heard and hereby enters final judgment thereon as set forth in the Judgment Entry of the Court herein dated September 22, 1977 and entered on the 23rd day of September, 1977 except as amended and supplemented herein, pursuant to said Rule 54(B) and as a Nunc Pro Tunc Order and Judgment.

2. Delete the sentence on page 2 "The Court finds that the Defendant, Ida Berger, was duly served with process personally according to law and that she failed and neglected to file an Answer or other pleadings in this matter", for the reason that said Ida Berger did file an Answer herein, said Answer was considered herein together with the evidence submitted at the trial, her prayer in said Answer is denied and the findings and order heretofore entered herein is reaffirmed.

3. The oral motion of the defendant, made during and after the trial of this cause, to amend and supplement Paragraph 10 on page 3 of his Amended Answer and Amended Cross-Complaint by interlineation, be and the same is denied.

4. It appearing that the Amended Answer and Amended Cross-Claim of the defendant Sanford J. Berger against the plaintiff and the New Party Defendant, Belle Benjamin, is not well founded, said Cross-Claim is denied and dismissed as against the plaintiff, Bertine M. Berger, and the new party defendant, Belle Benjamin.

5. Prior to trial, the parties herein and their respective counsel having agreed that the Amended Cross-Claim of the defendant, Sanford J. Berger, against the new party defendant Raymond Gardini and the Answer and Counter-Claim of the new party defendant, Raymond Gardini, and the Answer and Counter-Claim of Sanford J. Berger to the Pleading of New Party Defendant Raymond Gardini raises separate issues of fact and law from the case in chief for divorce, the Court finds that said Cross Claim of the defendant, Sanford J. Berger, against the new party defendant, Raymond Gardini, and the Answer and Counter-Claim of the new party defendant, Raymond Gardini, and the Answer and Counter-Claim of Sanford J. Berger to the pleading of new party defendant Raymond Gardini contained separate issues which do not arise out of the transaction, occurrence or succession or series of transactions or occurrences as the divorce action and common questions of law or fact are not involved and by reason thereof the claim set forth therein should be severed from the claims involving the other parties herein,

IT IS ORDERED

(a) That the claims asserted against Raymond Gardini by the defendant, Sanford J. Berger, and the claim

of Raymond Gardini against Sanford J. Berger be and hereby is, pursuant to Rule 20(B) of Ohio Civil Rules, severed herefrom and said claims shall be placed on the calendar for separate trial, after issues are joined,

(b) The motion to dismiss the Counter-Claim of Sanford J. Berger filed by said new party defendant be and hereby is denied, and said new party defendant is given twenty eight (28) days from the date hereof to file his Answer or other pleadings thereto.

/s/ JOHN L. MAXWELL
Judge

APPROVED BY:

/s/ H. DONALD ZIMMERMAN
H. Donald Zimmerman and

/s/ ALFRED PALAY
Alfred Palay - *Attorney for Plaintiff Bertine Berger and New Party Defendant Belle Benjamin*

/s/ RICHARD D. EISENBERG
Richard D. Eisenberg
Attorney for New Party Defendant Raymond Gardini

/s/ REFUSED TO SIGN
Frank K. Levin
Attorney for Defendant Sanford J. Berger and New Party Defendant Ida Berger

Journal Entry Overruling Motion for a New Trial

(Filed February 3, 1978)

No. D 68055
IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY, SS.

BERTINE M. BERGER,
Plaintiff,

v.

SANFORD J. BERGER *et al.*,
Defendant.

JOURNAL ENTRY

Motion of the Defendant for a new trial OVERRULED.

Matter of the defendant to show cause ordered set for hearing before the Court.

/s/ JOHN L. MAXWELL
Judge

Federal Constitutional Question Raised by Appellant in the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio

Letter of October 17, 1977, from H. Donald Zimmerman and Alfred Palay to Frank K. Levin

Zimmerman, Calicchio, Eisenberg and Palay
Attorneys at Law
5004 Mayfield Road
Cleveland, Ohio 44124

H. DONALD ZIMMERMAN
PAT CATICCHIO
RICHARD D. EISENBERG
ALFRED PALAY

SUITE 108
JEFFERSON CENTRE
(216) 291-2400

October 17, 1977

Frank K. Levin
Attorney at Law
700 One Public Square
Cleveland, Ohio 44113

Re: Berger -v- Berger
Case No. 75 D-68055

Dear Mr. Levin:

After reviewing the "Order and Judgment Nunc Pro Tunc Entry" which you submitted to us for approval or rejection, we reject same because the findings on page 2 were not within the scope of the Nunc Pro Tunc entry desired by the Court and are inserted only to raise questions or arguments which were not in issue at the time of the trial.

We believe that no constitutional question was involved which must be resolved by this Court. We also believe that the Court need not make the other findings submitted in your entry even if they were supported by the evidence, which in some instances we deny.

We are, therefore, re-submitting the entry which we originally submitted, a copy of which is enclosed.

Very truly yours,

H. Donald Zimmerman and

Alfred Palay
Attorneys for Plaintiff

AP:pw

Enclosure

c.c. - Honorable
John L. Maxwell

Excerpt From Order and Judgment Nunc Pro Tunc Entry of Appellant

(Proffered Prior to October 17, 1977)

Case No. 75 D 68055
IN THE COMMON PLEAS COURT
DIVISION OF DOMESTIC RELATIONS
CUYAHOGA COUNTY, OHIO

BERTINE M. BERGER,
Plaintiff,

vs.

SANFORD J. BERGER, *et al.*,
Defendants.

JUDGE JOHN L. MAXWELL

[Page 2 of proffered and rejected Order and Judgment Nunc Pro Tunc Entry]

* * * * *

* * * and it being expressly determined that there is no just reason for delay and expressly directed that final judgment upon the separated issues be entered. The remaining issues between the Answer and Counter-Claim of New Party Defendant, Raymond Gardini and the Answer and Counter-Claim of Defendant, Sanford J. Berger to the pleading of New Party Defendant, Raymond Gardini, and Jury Demand are to be treated separately and apart from this judgment.

The Court further finds upon the evidence that there has been no inferences or presumptions of adultery on the part of the plaintiff; there has been no recrimination; no condonation; no wilful absence for more than one year by the plaintiff; and no unclean hands on the part of the plaintiff.

The Court further finds that the constitutional rights of the defendant as guaranteed by the Constitutions of the State of Ohio and United States have not been violated and the defendant has not been denied equal protection of the laws.

The Court further finds that the rights of defendant as guaranteed by the Civil Rights Act of 1871, 42 U. S. Code Section 1983 and 42 U. S. Code Section 2000(e) 2 have not been violated.

The Court further finds that the defendant did not have or support any grounds entitling him to a divorce from the plaintiff, Bertine M. Berger.

The Court further finds that the plaintiff withdrew $36,000.00 from the National City Bank, or had it under her control, and that these funds were not property of the marriage.

The Court further finds that all testimony and evidence relative to defendant's conduct subsequent to the filing of the Complaint by plaintiff is admissible without amendment or supplemental pleading on the part of plaintiff.

* * * * *

Excerpt From Motion for New Trial and Reply Brief Filed by Appellant

(Filed on October 7, 1977 and November 13, 1977 respectively)

ARGUMENT XIII:

THE DIVORCE LAWS, AS APPLIED BY THE TRIAL COURT IN THE STATE OF OHIO IN THE INSTANT CASE, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT; AND THE TRIAL COURT'S APPLICATION THEREOF CONSTITUTES SLAVERY AND PEONAGE IN VIOLATION OF THE THIRTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND THE LAWS OF THE UNITED STATES.

APPENDIX E

Internal Revenue Code

§ 71. Alimony and separate maintenance payments

(a) General rule.—

(1) Decree of divorce or separate maintenance.— If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

* * * * *

Aug. 16, 1954, c. 736, 68A Stat. 19.

Editorial Notes

Date of the enactment of this title, referred to in subsec. (a)(2), (3), is Aug. 16, 1954.

§ 215. Alimony, etc., payments

(a) General rule.—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

(b) Cross reference.—

For definitions of "husband" and "wife" see section 7701(a) (17). Aug. 16, 1954, c. 736, 68A Stat. 71.

§ 7701

* * * * *

(17) Husband and wife.—As used in sections 71, 152(b) (4), 215, and 682, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term "wife" shall be read "former wife" and the term "husband" shall be read "former husband"; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such sections, the term "husband" shall read "wife" and the term "wife" shall be read "husband."